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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NATIONAL WOOD PRESERVERS, INC., *Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

and

CLIFFORD ROGERS and VIRGINIA ROGERS

Appellees

and

TOWNSHIP OF HAVERFORD, *Intervenor*

ON APPEAL FROM
THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT OF APPELLANT NATIONAL WOOD PRESERVERS, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Is there an unduly oppressive exercise of the State's "police power" in violation of the due process clause of the 14th Amendment to the United States Constitution, where a State statute enacted into law subsequent to the time a land occupier goes into possession of property, imposes liability upon him based solely on his status as a land occupier, to eradicate, at unlimited cost, a polluting condition partially under the property occupied by him, created by the unlawful acts of a third person, prior to his occupancy, which he has not contributed to and which has no reasonable nexus to his use of the property.

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania, dated April 24, 1980, affirming the Orders of the Commonwealth Court of Pennsylvania, is reported at — Pa. — , 414 A.2d 37 (1980) and is found in the Appendix at A-1. The opinion of the Commonwealth Court of Pennsylvania, dated May 24, 1978, affirming in part and reversing in part the Adjudication and Order of the Environmental Hearing Board, is reported at 35 Pa. Commonwealth Ct. 443, 387 A.2d 142 (1978) and is found in the Appendix at A-25. The Adjudication and Order of the Environmental Hearing Board, dated July 30, 1976, is unreported and is found in the Appendix at A-48. A pre-hearing Opinion of the Environmental Hearing Board denying a Petition to Join Samuel Jacoby as an Additional Defendant, *In Re National Wood Preservers, Inc.*, 64 D&C2d 78 (1974) and is found in the Appendix at A-91.

JURISDICTION

The Pennsylvania Clean Streams Law was enacted in 1937 (Act of June 22, 1937 P.L. 1987). Section 316 became a part of that law in 1965. As originally written, this section gave the State power to order a landowner or occupier to grant access to the land to permit the Commonwealth or an appropriate agency of the Commonwealth to eliminate a polluting condition.

Section 316 was amended on July 30, 1970. The 1970 Amendment which is the current language of the statute, drastically altered the scope of this section of the law so as to place responsibility for eliminating a polluting condition on landowners and occupiers. It now provides in part as follows:

> "§691.316 Responsibilities of Landowners and Land Occupiers
>
> Whenever the Sanitary Water Board finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth, the Board may order the landowner or occupier to correct the condition in a manner satisfactory to the Board or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any persons holding title to or having a proprietary interest in either surface of subsurface rights." (Act of June 22, 1937, P.L. 1987 Article III, §316 *as amended July 31, 1970*, P.L. 653, 35 P.S. §691.316) (full text at A-113)

On July 12, 1973, Appellee, Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "DER") issued identical Enforcement Orders to Appellant, National Wood Preservers, Inc. (hereinafter "Wood"), Shell Oil Company (hereinafter "Shell") and Philadelphia Chewing Gum Corporation

(hereinafter "Gum").[1] *The persons and entities to whom these orders were issued all had the status of being landowners or occupiers of property located in the area of Eagle Road and Penn Central Railroad in Haverford Township, Delaware County, Pennsylvania.*

These Orders stated that a contaminant consisting of creosote containing pentachlorophenol was causing a serious problem to the ground and surface waters of the Commonwealth known locally as "Naylor's Run" in the area of Eagle Road and Penn Central Railroad in Haverford Township, Delaware County, Pennsylvania (R 25 - 30).[2] By these Orders, Appellant Wood and other entities and persons to whom they were issued, were directed to expend the funds needed to conduct tests, define the specific area of the contamination, develop engineering plans to remove same and to then, in fact, remove the contaminant from the ground and surface waters ". . . to such a degree as to restore the waters to their natural quality". (See Orders of DER dated July 12, 1973, found in the Appendix at A-101)

From these Orders, Wood and all other entities and persons to whom they were issued filed timely Appeals to the Pennsylvania Environmental Hearing Board (hereinafter "Board") which ordered all such Appeals consolidated.

By Adjudication and Order dated July 30, 1976, the Board sustained in part and dismissed in part the various Appeals. (See Adjudication of Environmental Hearing Board dated July 30, 1976, Appendix at A-48)

From this Adjudication and Order, Wood and all other entities and persons to whom the original Enforce-

1. On September 21, 1973, a similar Order was issued to Clifford A. and Virginia Rogers (hereinafter "Rogers"). (R 31, 32, A-107)

2. These and subsequent page references referred to hereinafter in this Jurisdictional Statement, which are preceeded with the letter "R", are found in the three (3) volume Reproduced Record in this matter. Those which are preceeded by the letter "A", are found in the Appendix submitted herewith.

ment Orders had been issued, filed timely Appeals to the Commonwealth Court of Pennsylvania. Once again, the various Appeals were ordered consolidated by the Court for the purpose of the proceedings before it.

On May 24, 1978, the Commonwealth Court issued its Opinion and Order sustaining the Appeals of Gum and Shell and dismissing the Appeals of Wood and Rogers. (Appendix at A-25)

On June 16, 1978, Wood filed with the Supreme Court of Pennsylvania, a Petition for Review of the Opinion and Order of the Commonwealth Court. Petitions for Review were also filed with the Pennsylvania Supreme Court by Rogers and by the DER with respect to that portion of the Commonwealth Court's Opinion and Order which dismissed Shell and Gum from the proceedings.

On February 16, 1979, the Supreme Court of Pennsylvania granted these Petitions for Review and ordered the matters consolidated for argument on appeal.

On April 24, 1980, the Supreme Court of Pennsylvania issued its Opinion and Final Judgment in this case, affirming the Orders of the Commonwealth Court as to Wood and Rogers and dismissing the Appeal of the DER because not filed timely.

At all stages of the proceedings, Appellant Wood argued that the 1970 Amendment to §316 of the Pennsylvania Clean Streams Law, Act of July 31, 1970, P.L. No. 222, 35 Pa. Stat. Anno. §691.316, created an unconstitutional burden upon Appellant in violation of the due process clause of the 14th Amendment to the United States Constitution.

Notice of Appeal to this Court was filed with the Prothonotary of the Supreme Court of Pennsylvania on July 3, 1980, and is found in the Appendix at A-101.

This Court has jurisdiction over this Appeal pursuant to 28 U.S.C. §1257(2).

This Appeal lies because the highest Court of the Commonwealth of Pennsylvania has sustained the pro-

visions of §316 of the Pennsylvania Clean Streams Law against a challenge that it is unconstitutional on its face and as applied to Appellant Wood. (See, *Cohen vs. California*, 403 U.S. 15, 29 L.Ed.2d 284, 91 S.Ct. 1780 (1971).

In upholding the validity of this statute, the Pennsylvania Supreme Court refused to rule on an independent state ground for reversing or affirming the decision of the Court below and has instead based its decision squarely upon the constitutional question presented to it by Appellant. Since the State court, after entertaining this constitutional question, has decided it adversely to the claim of unconstitutionality asserted by Appellant, this Court has jurisdiction to hear an appeal of this case. 28 U.S.C. 1257(2); *Hancock National Bank vs. Farnum*,176 U.S. 640, 20 S.Ct. 506, 44 L.Ed 619 (1900); *Henderson Bridge Co. vs. City of Henderson, Ky.*, 173 U.S. 592, 19 S.Ct. 553, 43 L.Ed. 823 (1899).

STATEMENT OF THE CASE

Trial on the merits of these consolidated matters commenced on November 20, 1974, before Board-Appointed Hearing Examiner, Louis A. Salamon, Esquire, and encompassed thirteen (13) days of testimony.

At the outset of the trial, *all parties, including Appellee DER entered into a Stipulation providing that the sole basis for the issuance of the Enforcement Orders by DER against the persons or entities to whom they were issued, was based upon the language contained in §316 of the Clean Streams Law.* (35 Pa. Stat. Anno. §691.316, See R 187(a) and Adjudication of Environmental Hearing Board dated July 30, 1976, at A-52).

The testimony and exhibits introduced at the Hearing before the Examiner established the following facts, substantially, all of which are contained in the Board's Adjudication and were affirmed by the Commonwealth Court and Supreme Court of Pennsylvania.

The Land, Waters, Parties and Polluting Condition

For over thirty four (34) years Rogers owned a piece of land located at Eagle and Lawrence Roads in Haverford Township, Delaware County, Pennsylvania. (See Adjudication of Environmental Hearing Board dated July 30, 1976, Finding of Fact #1, A-52) On January 10, 1947, Rogers leased this property to Samuel T. Jacoby and C. David Jacobs. They, in turn, assigned the lease to National Wood Preservers, Inc., a corporation which had been incorporated by Jacoby on January 24, 1947, and all of the stock of which was owned and controlled by him. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #2, Footnote 3, A-51, 52; and Stipulation Between Counsel for all Parties, R 136a, 137a)

Thereafter, for a period of sixteen (16) years from March 28, 1947 until July 30, 1963, Jacoby, through this corporate entity which he owned and controlled, operated a wood preservation business at the above-referred to leased location. (See Adjudication of Environmental Hearing Board dated July 30, 1976, Finding of Fact #3, A-53) During this period of time, *Jacoby, while conducting this business, used a chemical substance known as pentachlorophenol to treat and preserve wood, which he disposed of by pumping it into a thirty (30') foot deep well located on the leased premises.* (See Adjudication of Environmental Hearing Board dated July 30, 1976, Finding of Fact #4, A-53)

During the course of Jacoby's tenure as owner of this business, from at least 1953 until the Goldstein family purchased it from Jacoby on July 30, 1963, neighbors in the area surrounding the physical location of Jacoby's business, complained of the pollution of Naylor's Run Creek, complaining about an oily brownish liquid floating on the surface of the creek. (R 862, 863) As a result of these complaints, Haverford Township officials and the State Sanitary Water Board personnel investigated Jacoby's operation. (R 862-873) *In the summer of 1956,*

Jacoby discontinued the use of the well into which he had pumped the pentachlorophenol. (R 883)

By agreement dated July 30, 1963, *(exactly seven years before §316 in its present form was enacted)*, the Goldstein family, through a Pennsylvania corporation, NWP, Inc. purchased from Jacoby, all of his outstanding stock in Wood. (Exhibit E-12, R 70 - 85, 189; Stipulation Between Counsel for all Parties, 136, 137)[3]

Approximately one (1) month prior to purchasing the business from Jacoby, on July 30, 1963, Harris Goldstein came upon the premises and remained there continuously for that month in order to determine if he and his son would buy the business. (R 962, 963) While he was there, he observed the *generally dirty nature* of the operation. He inquired of Jacoby as to whether he had any pollution problem. (R 966, 967; 1032, 1033) *He was assured at this time that although there had previously been a pollution problem, it had been cured.* (R 966, 967; 1032, 1033) *Goldstein's concern at that time about a pollution problem was not based upon any knowledge of a specific polluting condition, but rather was based upon his general concern due to the dirty nature of the operation and an awareness of pollution problems in general from his reading of newspapers.* (R 1032, 1033; 1048-1050) *In particular, he had not seen the stream (Naylor's Run) at this time, and he had no knowledge of long term complaints about the pollution of the stream created by Jacoby's activities over the years he had operated the business.* (R 1047)

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3. NWP, Inc. is a Pennsylvania Corporation formed by Harris and Alan Goldstein, on July 9, 1963. On August 30, 1963, the Pennsylvania Corporation, known as National Wood Preservers, Inc., which had been incorporated by Jacoby on January 24, 1947, changed its name to Eagle Wood Preservers, Inc., and filed an Out-Of-Existence Certificate with the State on September 11, 1963. On September 9, 1963, NWP, Inc., amended its Articles of Incorporation to change its name to National Wood Preservers, Inc., the present Appellant. (See Stipulation Between Counsel for All Parties, R 136, 137).

As a result of his general concern that any pollution problem had been cured, he insisted that a clause be inserted in the July 30, 1963 stock purchase agreement (Examiner's Exhibit 12, paragraphs 8h, R 70-85) to warrant that any pollution problem had, in fact, been cured. (R 966, 967; 1048-1050)[4]

Following the Goldstein's purchase of the stock of Wood from Jacoby, they continued as a tenant of Rogers, to run the business on the same physical site previously used by Jacoby. Under the arrangement, whereby the Goldsteins purchased the stock of Wood from Jacoby, it was agreed that Jacoby would remain for a year to aid them in operating the business. (R 967) However, a little less than two (2) months later, on September 17, 1963, Jacoby was arrested by the Pennsylvania State Police for polluting.[5] (R 873, 874, 886, 967)

As a consequence of the arrest of Jacoby and the revelations to Goldstein of a pollution problem, Goldstein and the Township Health Supervisor, as well as representatives of the Pennsylvania Sanitary Water Board met at or around September 20, 1963, to discuss steps to be taken by the Goldsteins to clean up the business premises formerly run by Jacoby. (R 886, 887, 892-894, 968, 969)[6]

As a result of the conference, it was agreed that the Goldsteins would hire a consultant to prepare a report

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4. Paragraph 8(h) of the Agreement of July 30, 1963, between NWP, Inc. and Jacoby, reads as follows:

"8 Jacoby represents and warrants that

* * *

(h) There is no litigation pending or threatened against it by any agency or instrumentality of the Federal, State or local governments, except for a change of stream pollution since cured."

5. As of this date, Goldstein had already paid to Jacoby, the sum of Two Hundred Forty Four Thousand ($244,000.00) Dollars toward the full purchase price of Five Hundred Eighty Thousand, Seven Hundred and Twenty ($580,720.00) Dollars. (See R 70, 86).

6. The Sanitary Water Board was the predecessor state agency to DER, the present Appellee.

recommending the steps to be taken by them to satisfy the state and township officials about the pollution problems. (R 968-970; Exhibits NWP 4 and NWP 5, R 116-129)

The Goldsteins completed every step set forth in the report in accordance therewith; finished all such steps by the required target date of June 1, 1964, advised the Sanitary Water Board of each step in the process as it was completed and received approval for the work after inspection by the Board after the completion of each step, as well as an overall approval of the work. (R 968-978; 1027-1032; Exhibits NWP 6, 7, 8, 9 and 10; R 103-134)

The overall cost incurred by the Goldsteins in making all of the State required and State approved changes set forth in 1964 was approximately Seventy Five Thousand ($75,000.00) Dollars. (R 1030)

As a further part of the agreement with the State in 1964, the Goldsteins agreed on a going forward basis to police the creek every day by collecting any oil floating on the surface. The cost to Appellant Wood of policing the creek on a daily basis since 1964 and of making the above changes has cost appellant One Hundred Forty Five Thousand, Two Hundred ($145,200.00) Dollars as of the date D.E.R. issued its enforcement order.

As a result of Jacoby's arrest, the Goldsteins consulted their attorney about attempting to force him to buy back the stock of the business. However, they were advised that because of the costly and protracted nature of such legal proceedings, they would be better off if they met with State and township officials in order to correct the pollution problem. (R 967, 968)

By Agreement dated December 31, 1964, the Goldsteins in consideration for receiving from Jacoby the sum of Thirty Five Thousand ($35,000.00) Dollars, released Jacoby from the warranty in the July 30, 1963 stock purchase agreement that the pollution problem had been incurred. (Exhibit E-13, R 86-89; 183-185)

This Agreement (Examiner's Exhibit 13, R 86-89) *states that although the Goldsteins "have made certain demands and claims upon Jacoby including a claim that stream pollution exists in breach of paragraph 8H of the stock purchase agreement" said claims "have been disputed by Jacoby.* (R 86-87) The Agreement further points out that *the Thirty Five Thousand ($35,000.00) Dollar reduction in the purchase price of the business was only partially for the cost expended by the Goldsteins in correcting and curing the alleged stream pollution problem and partly for claims related to the financial conditions and affairs of the company.* (R 87)

On February 10, 1967, Appellant Wood gave up a portion of its leasehold interest on the leased premises so that Rogers could, in turn, lease same to Shell. (Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #6 A-53) and Shell has operated and maintained a gasoline station on that parcel ever since leasing the premises on February 10, 1967. (Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #7 A-54)

Gum occupies a parcel of land on the opposite side of Eagle Road from the parcels owned by Rogers and occupied by Shell and Wood. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #8 A-54)

On July 12, 1973, the DER issued the Orders above mentioned.

From these Orders, all parties appealed to the Environmental Hearing Board.

The Adjudication of the Environmental Hearing Board

In its Adjudication and Order of July 30, 1976, the Environmental Hearing Board found as a fact that the pollution problem in question had been caused by the conduct of Jacoby in pumping pentachlorophenol into

the well above referred to. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #4 A-53, and Footnote 13, A-84)

The Board further found as fact that the present Appellent Wood, under the operation of the Goldstein family ". . . has not discharged or permitted the discharge of industrial waste into the waters of the Commonwealth" (see Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #5, A-53); *and also found that Wood by its present management, the Goldstein family, has cooperated with the DER and its predecessor entity, the Pennsylvania Department of Health, Sanitary Water Board, in the earlier efforts to remedy this pollution problem on and off the property which Appellant Wood occupies.* (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #80 A-72)

The Board found that the pentachlorophenol in question was under the surface of the property leased by Appellant Rogers, to Appellee Shell and Appellant Wood; that this pentachlorophenol flowed southwesterly under Eagle Road, a highway owned and maintained by the Commonwealth of Pennsylvania and that thereafter it infiltrated under the surface of property owned by Appellant Gum into a storm sewer pipe on the property of Gum maintained by appellee, Township of Haverford, and that the pentachlorophenol traveled through the storm sewer pipe and was discharged at its terminus into Naylor's Run. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #72 A-70)

The Board determined that the pentachlorophenol is under the property owned and maintained by the Commonwealth of Pennsylvania and the Township of Haverford and by landowners or occupiers, the identity of whom or which were not disclosed in the proceedings before it. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #74(b) A-70, 71)

It found also that in order to determine the volume of pentachlorophenol under the surface of the property owned or leased to Appellants, including Appellant Wood and how widely the pentachlorophenol was disbursed thereunder, many more wells would have to be drilled on the property to the water table and additional samples from these wells taken. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #76 A-71)

It found finally that it was impossible to assess the cost of the removal program until further drillings, testing and sampling was completed; and, the participation of landowners and occupiers, in addition to the Appellants, would be necessary in order to complete the drilling, testing and removal program. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact #78 and #79 A-72)

All Appellants challenged the constitutionality of §316 of the Clean Streams Law on the basis that it was unconstitutional since it punishes a "status" and required them to assume responsibility to correct a condition which none of them caused, created or were at fault in continuing. (R 192-197; 33-35). They also challenged the constitutionality of §316 on the grounds that it was invalid ex post facto legislation. (R 192-197; 33-35)

As to all such attacks on the constitutionality of §316 of the Clean Streams Law, the Environmental Hearing Board ruled that it did not have the authority to pass upon the constitutionality of §316 of the Clean Streams Law and that it would assume the constitutionality thereof for the purposes of its Adjudication. (See Adjudication of Environmental Hearing Board, dated July 30, 1976, A-74)

Appellants also argued and contended that the DER was applying §316 in an unconstitutionally discriminatory fashion particularly because of its failure to include in the proceedings, Jacoby as the party who had created the polluting condition and other property owners, in-

cluding the Township of Haverford and the State Department of Highways, under whose property the polluting condition was also found to exist. Prior to the hearings before the Environmental Hearing Board, Shell had petitioned to join Jacoby as an additional defendant, pursuant to the State Civil Procedural Rules, on the basis that he was the party responsible for causing the condition. DER opposed this joinder and the Board sustained that position, denying the Petition on the grounds that only DER had the authority to bring Jacoby upon the record. *In re National Wood Preservers*, 64 D&C2d 78 (1974), A-91. DER at no time sought to join Jacoby in those proceedings.

In its Adjudication, the Board in dismissing the contentions of discriminatory enforcement, alluded to the fact that §316 of the Clean Streams Law permitted DER to ignore the issue of fault in proceeding to recover clean-up costs. It stated:

> ". . . *Section 316 clearly authorizes the Department to ignore the issue of fault, as it is done here, and proceed against whoever owns or occupies land so as to remedy a pollution problem as quickly as possible. We might perfer a more delicate balancing of responsibility in the Department's actions, but we cannot say their approach is unauthorized.* (Adjudication of Environmental Hearing Board, July 30, 1976, Footnote 13, A-84)

The Board also ruled that it would restrict any Order against the Appellants so that they would be required to take corrective measures only upon property owned or occupied by them.

After disposing of all of the arguments raised by the various Appellants in the proceedings before it, the Board issued its Adjudication.

The Commonwealth Court Decision

On appeal, *the Commonwealth Court ruled that §316 could not constitutionally be applied to any of the*

parties before the Board based solely upon their ownership or occupancy of land.

The Court went on, however, to point out that where a statute can be given two constructions, one of which will render it constitutional and the other unconstitutional, the former construction must be invoked.

Relying on this principle, the Court held that there was a construction of §316 which both comports with the law of public nuisance and renders that section constitutional as applied to the factual situation present in this case.

As stated by the Court, *where a polluting condition has been created by the conduct of an individual other than an owner or occupier of the land*, that owner or occupier *can be ordered to take corrective measures if after knowing of the existence of the condition on his land, he engages in some affirmative conduct indicating his adoption of the condition.*

In discussing this theory, as it related to Appellant Wood, the Court found that in not "divesting" itself of the business after Jacoby's arrest, by accepting a Thirty Five Thousand ($35,000.00) Dollar credit from Jacoby in reduction of the purchase price for his stock, together with its actions in taking "measures to correct the pollution problem", it engaged in such "affirmative conduct" as would be an "adoption" of that condition.

As a result of determining that Wood engaged in such affirmative action, the Court held that it had adopted the polluting condition and dismissed Appellant's appeal and affirmed the Order of the Board. The Court also dismissed the appeal of Rogers, the owner of the property leased to Shell and Wood on the grounds that they had adopted the condition as well. With respect to Gum and Shell, however, the Court found that neither of those entities had engaged in "affirmative conduct" constituting an adoption of the polluting condition and therefore sustained their appeals and dismissed the mat-

ter as to them. (Commonwealth Court's Opinion, A-40, 41)

From the Order and Opinion of the Commonwealth Court, Appellant Wood filed a Petition for Review to the Pennsylvania Supreme Court which was granted as No. 66 January Term 1979 and consolidated for argument with the Appeals filed by Clifford and Virginia Rogers (No. 67 January Term 1979) and an Appeal filed by DER (No. 68 January Term 1979), from that portion of the Commonwealth Court's Opinion and Order which dismissed the matter as to Gum and Shell.

The Pennsylvania Supreme Court's Decision

The Pennsylvania Supreme Court in its Opinion of April 24, 1980, acknowledged that this was "a case of first impression", calling for the construction and a determination of the constitutionality of §316 of the Clean Streams Law. (*National Wood Preservers, Inc. vs. Commonwealth of Pennsylvania, Department of Environmental Resources*, ____ Pa. ____, 414 A.2d 37 (1980), see Appendix, A-1)

> "This is a case of first impression. At issue is the construction and constitutionality of Section 316 of The Clean Streams Law, Act of July 31, 1970, P.L. 653, §12, amending 35 P.S. §691.316." (414 A.2d at pg. 38; Appendix at A-2)
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> * * *
>
> "The principal questions presented by this appeal are whether Section 316 authorizes the Department of Environmental Resources to remedy water pollution resulting from conditions other than mine drainage, and whether Section 316 is a constitutional exercise of the Legislature's police power." (414 A.2d at page 39; Appendix at A-2)

The Court first found that this section properly applied to pollution from conditions other than mine drainage. It then took up the question of the Statute's constitutionality, stating,

"Appellants' second contention is that Section 316 of The Clean Streams Law is an impermissible exercise of the police power, in violation of the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution." (414 A.2d at page 42; Appendix at A-9)

The Court stated Appellant's position as follows:

"Appellants do not argue that Section 316 is 'unduly oppressive' because of its economic impact or its interference with their use of the property. Rather, Appellants advance the somewhat unique argument that Section 316 is unduly oppressive because it imposes liability upon Appellants solely on the basis of their ownership or occupancy of the land in question." (414 A.2d at page 45; Appendix at A-16)

The Court then made clear that it would not decide the case on State law concepts of "fault", causation or the theory of "adoption" articulated by the Commonwealth Court, but rather would deal directly with the constitutional question presented. Said the Court:

"16. Appellants assume that they have acted without 'fault' and have not 'caused' the pollution. In light of our disposition of this case, we need not consider this assumption." (414 A.2d page 45, Footnote 16; Appendix at A-16)

The Court, stating that it disagreed with Appellant's argument, held §316 to be a constitutional exercise of the State's police power:

"We disagree. First it is absolutely clear that the corrective orders here are based on much more than mere ownership or occupancy. As discussed above, they are based upon legislation designed to eliminate all water pollution, and the Environmental Hearing Board's findings that a substance, deter-

mined to be pollution, resides under appellant's land and can feasibly be removed. There is thus a reasonable and concrete basis for the corrective orders here." (414 A.2d at page 45; Appendix at A-16)[7]

The concurring opinion of Justice Flaherty stated that the majority opinion was actually providing for an unconstitutional imposition of liability, based solely on ownership or occupancy of property. He, therefore, concurred only in the result since he accepted the theory of "adoption" articulated by the Commonwealth Court. He said:

> *"A reading of the majority opinion might lead to the belief that we adopt the strict liability construction of Section 316 which would compel the expenditure of financial sums by an owner or occupancy (sic) of land based on no other factor but the ownership or occupancy of the land."* (414 A.2d at page 47, Concurring Opinion, A-21)
>
> Justice Flaherty then stated his belief that an excercise of the police power had to be associated with the *use* to which one puts his property and not his mere ownership or occupancy. He said:
>
> * * *
>
> *"It has always been recognized that the 'right' of property ownership carries with it a concurrent*

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7. The Court's statement that the Environmental Hearing Board had found that the pollution "can feasibly be removed" was apparently referring to *technical* or scientific feasibility *rather than economic feasibility*. The Environmental Hearing Board specifically found as a fact that there was insufficient testing performed to determine the total volume of material under the property owned or leased by Appellants or how widely it was disbursed under the surface of Appellant's property. (Adjudication of Environmental Hearing Board, July 30, 1976, Finding of Fact No. 73 (a) and (b), A-70). Accordingly, it found that it was "impossible to assess the cost of such a removal program until further drilling, testing and sampling is completed." (Adjudication of Environmental Hearing Board, July 30, 1976, Finding of Fact, No. 78, A-72).

'obligation' which is inherent in the basic relationship of an 'owner' of property to society. These 'obligations', however, have always related to the use one puts to property, not mere ownership. The ancient maxim of the common law is, 'Sic utere tuo ut alienum non laedus', 9 Coke 59—So use your own property as not to injure your neighbor. Where society requires, the property of another can be taken, but only with due compensation. *To construe the subject Act as providing for strict liability, based on nothing more than the ownership or occupation of land, would be to impose on innocent individuals, the burden which should be borne by society as a whole, thus, an unconstitutional taking. I, thus, concur only in the result."* (414 A.2d at page 48; Concurring Opinion, emphasis added, A-23, 24)

Notice of Appeal from the Court's Judgment to the Supreme Court of the United States was filed with the Lower Court on July 3, 1980.

THE ISSUES ARE SUBSTANTIAL

Section 316, which has been declared constitutionally valid by the highest court in the State of Pennsylvania, appears to be strongly rooted in the desire to advance social purposes by restoring the environment. Nevertheless, in its sweep, by imposing liability on nothing more than status and geographical proximity to a polluting condition, it so drastically infringes on personal and property rights as to raise anamolous visions of oppressive results that defeat the very essence of the social aims which apparently inspired this legislation.

For example, consider the possibility for injustice if this law existed in the State of New York. The media constantly reminds us of the families who own or rent property built over the toxic dump which is Love Canal. These people live in fear of cancer, deformed infants and

other health horrors created by the chemical dumping there years ago. Yet, under the statute here at issue, these people who did not create this problem and who suffer drastically from it, could be forced to clean up the pollution at unlimited cost and without any attempt at all by the government to first seek restoration from the chemical companies who created the problem. This is not a mere abstract hypothetical possibility in light of what happened in this case.[8]

An environmentally awakened society is discovering new "Love Canal" type dump sites every day. Should the cost of this problem be borne by the government as a whole or by the poor unfortunate people located over the geographical confines of such a dump?

If the problems at the "Three Mile Island" nuclear generating plant in Harrisburg, Pennsylvania, created an escape of radioactive material which seeped into local water supplies, the families most harmed by the problem could be expected under this legislation to clean it up.

The Statute here at issue pushes the use of the State's "police power" to a new horizon which it is sincerely believed has not yet been judicially considered by this Court.

To focus in sharply on what is at stake herein, it is perhaps wise to point out what Appellant sincerely believes is not involved in this case.

This is not a situation in which the State has exercised its "police power" to place a mere prohibition or restriction upon a lawful use of property, which reduces the economic value of the property. (See *Hadacheck vs. Sebastian*, 239 U.S. 394, 60 L.Ed. 348, 36 S.Ct. 143

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8. The Statute at issue in this case has no provision which requires the State to first proceed against the party responsible for creating the polluting condition before seeking to hold landowners or occupiers effected thereby responsible to eliminate it. In this very case, the DER resisted efforts to join the party responsible while at the same time proceeding against the innocent Appellants. *In re National Wood Preservers, Inc.*, 64 D&C2d 78 (1974) at A-91).

(1915); *Goldblatt vs. Town of Hempstead*, 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987 (1962))

Nor, is this a case in which a State, through the exercise of its "police power", orders a property owner to destroy a portion of his property in order to preserve other property. *Miller vs. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928)[9]

It is also not a case in which a State, through the exercise of its "police power", imposes affirmative cost obligations on a property owner in connection with some business or other justifiable use by the property owner of his property. See, *Queenside Hills Realty Co., Inc. vs. Saxl*, 328 U.S. 80; 90 L.Ed. 1096 (1946); *Atchison, Topeka & Santa Fey R. Co. vs. Public Utilities Commission*, 346 U.S. 346, 74 S.Ct. 92, 98 L.Ed. 51 (1953)[10]; or in which a limited fine, as distinguished from unlimited clean-up costs, is imposed upon a property owner for the negligent or criminal act of a third person, but *which could only have occurred because of the property owner's use of its property or operation of its business. United States vs. General Motors Corporation*, 403 F.Supp. 1151 (D. Conn. 1975); *United States vs. Marathon Pipe Line Co.*, 589 F.2d 1305 (7th Cir. 1978); *United States vs. Tex-Tow, Inc.*, 589 F.2d 1310 (7th Cir.

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9. Even in *Miller vs. Schoene*, supra, the property owner was reimbursed for the cost of removing and destroying the ornamental red cedar trees which he had been ordered to destroy because of rust disease.

10. In *Queeenside Hills Realty*, supra, the police power was used to require a property owner to install a sprinkler system in a lodging house in accordance with a state law which required the installation of such systems in all multiple dwelling lodging houses. There, the imposition of new costs was placed upon the property owner *in connection with his continued use of the property as a lodging house* renting it to boarders who should be protected from the hazard of fire as much as possible. In *Atchison, Topeka, Santa Fey Ry Co. vs. Public Utilities Co.*, supra, the costs were imposed in connection with the railroad's continued use of the grade crossing in question.

1978)[11] In the present case, the findings of the Environmental Hearing Board, affirmed on appeal, establish that the condition was created by the unlawful activities of Jacoby years before the business was purchased by the Goldstein family, and that Wood, through the management of the Goldstein family, has not discharged or permitted the discharge of industrial wastes into the waters of the Commonwealth. *Under these circumstances, the polluting condition created before Wood acquired possession of the property, occurs without its intervention, is unrelated to its use of the property and will continue on from day to day, irrespective of its presence or*

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11. An examination of the various provisions of §311 of the Federal Water Pollution Control Act (33 U.S.C.A. §1321), discussed by the Court *United States vs. Tex-Tow, Inc.*, supra, as contrasted with §316 of the State law in the present case, is instructive in dealing with the issue of the oppressive nature of §316. The Federal Water Pollution Control Act is considerably less oppressive in its operation than §316 of the Pennsylvania Clean Streams Law here under attack. *Under the Federal Statute, unlike §316 of the State law, clean-up costs, which are unlimited, cannot be assessed against an operator of a facility if the spill or discharge resulted from an act or omission of a third party.* (33 U.S.C.A. §1321(F); *United States vs. Tex-Tow, Inc.*, supra). On the other hand, *the limited civil penalty provisions* of the Federal Act, permit a penalty to be assessed against the operator of a facility even if it does result from the act or omission of a third person. *In that case, however, liability is based on causation which is found to exist because the Defendant engages in an enterprise or activity that of necessity may result in spills, irrespective of his use of all precautions. See United States vs. Tex-Tow, Inc.*, supra, 589 F.2d at page 1314; *United States vs. Marathon Pipe Line Co.*, supra, 589 F.2d at page 1309. Additionally, in dealing with the limited civil penalty provision of the Federal Act, the Defendant's culpability and his ability to pay a limited fine must all be considered in determining the amount of the civil penalty. See, *United States vs. Tex-Tow, Inc.*, 589 F.2d at page 1313. Under §316 of the law, however, liability is unlimited, does not depend upon on whether the activity, enterprise or use to which the land owner or occupier puts his property might result in a risk of pollution and is not limited by his degree of culpability or ability to pay, it simply rests upon mere ownership or occupancy of the property itself.

absence from the property. More importantly, the Statute does not require any nexus between use and landownership or occupancy before liability can be imposed.

This is not even a case involving an innocent owner's forfeiture of property because of the criminal acts of his Lessee. See *Calero-Toledo vs. Pearson Yacht Leasing Co*, 416 U.S. 663, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974).[12]

Finally, this is not a case in which a landowner or occupier is assessed for improvements made in front of the property occupied by him. Such assessments are uniformly upheld only to the extent that special benefits accrue to the property assessed. See 16A C.J.S. Constitutional Law §661, pgs. 1035-1042 and particularly, at pages 1037, 1038 and cases therein cited. In the present case, no claim is made that removal of the pollutant will benefit the Appellant who is a tenant of the surface land.

Rather, what is at stake in the present case is the propriety of a State's raw, naked right through the use of its "police power" to impose on a land owner or occupier, the affirmative obligation to eradicate, at unlimited costs, a polluting condition, based on nothing more than that land occupier's status and geographical proximity to the condition in question.

If the validity of this Statute is affirmed without further consideration by this Court, it may signal legislatures in other states desirous of attacking pollution problems, that they may now abandon previous statutory enactments designed to strike an acceptable balance between accomplishing desireable environmental goals and protecting the rights of private individuals, in favor of expedient, but oppresive laws which eliminate any consideration of such rights.

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12. In the forfeiture case, the innocent owner's responsibility is limited to the value of the property forfeited and his liability arises out of the third party's use of the forfeited property with his consent. In the present case, however, the owner or occupiers' liability is unlimited and unrelated to the use of the property.

The Pennsylvania Supreme Court has Misconstrued Prior Holdings of this and Other Courts in Dismissing *Appellant's Contention that the Statute is Unduly Oppressive*

The decision by the Pennsylvania Supreme Court in this case does not blend neatly with the past holdings of this Court which dealt with police power legislation. Appellant's belief that the Statute is "unduly oppressive", is founded upon a multi-faceted combination of factors not present in the cases cited by the Pennsylvania Supreme Court as precedents.

It is submitted that the combination of oppressive features found in Section 316 are sufficient to overcome any presumption concerning the constitutional validity of this legislative enactment.

The Government is Not Merely Regulating Past or Present "Use" of the Property by the Party to be Charged With Liability, but Instead is *Taking Resources from the Most Expedient Source at Hand*

As the Supreme Court of Pennsylvania has correctly pointed out, reduction of property value due to regulation as to use has to be complete before there is a "taking." *Hadacheck v. Sebastian*, supra.; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393,43 S.Ct. 158, 67 L. Ed 322 (1922). Even when complete destruction of private property used in an individual's business enterprise is reasonably necessary to protect the rest of the community, the destruction of that property does not constitute a compensable taking. *Miller v. Schoene*, supra.

If a complete loss of property can be justified for the purpose of ensuring the safety of the community, does this mean that there is no limit on the police power? Even in *Miller v. Schoene*, *supra*, the owner of the offending trees which were destroyed for the public good was not required to pay for the cost of destroying or removing them.

Appellant is not asked to change the method of its

wood preserving operation or limit its activities; nor is it prohibited from putting its property to a more profitable use because of zoning, or regulation such as was encountered in *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L. Ed. 2d 631 (1978), relied on so heavily by the Pennsylvania Court. The "taking" in this case does not need to be found through a complex analysis of whether or not the government is prohibiting some valuable use of property, or is physically occupying it. Here, Appellant is being ordered to take affirmative action to eradicate pollution present under the surface of property which it leases for its business at enormous expense and without regard to its use of that property.

The decisions cited by the Pennsylvania Court to sustain the proposition that the police power can constitutionally require the positive expenditure of funds involve more than mere ownership or occupancy of property, i.e. they deal with regulation of activity on the property related to the use of that property.[13] For that reason, the property owner in those cases had the choice of incurring the cost or ceasing the activity in question.

Appellant has no such choice between complying with the Order or ceasing its activities. It has been ordered to eradicate a condition which will exist in the ground waters whether or not Appellant continues to operate its business as before. Additionally, the business can be carried on with or without the existence of the polluting condition under the ground.

Appellant's use of the property leased from Rogers has continually been confined to the surface of the land. Appellant's operation of its wood treatment facility was made clean at the beginning of its operation, seven years before the enactment of the present statute. How, then, can the remedial legislation be connected to Appellant Wood under the operation of the Goldsteins?

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13. These cases are discussed at Footnote 10 above.

The State court has also cited modern cases imposing liability on landowners for the negligent acts of third persons. See, i.e., *United States vs. General Motors Corporation*, 403 F.Supp. 1151 (D.Conn. 1975); *United States vs. Tex-Tow, Inc.*, 589 F.2d 1310 (7th Cir. 1978). The distinguishing characteristics of those cases is that the enterprise or activity in which those Defendants engaged of necessity entailed the risk that pollution would occur even though they took all precautions possible. Additionally, those cases dealt with a statutory scheme which imposed a limited fine, not unlimited clean-up costs, and which considered the Defendant's ability to pay and culpability in bringing about the polluting condition in question. Those factors are all notably absent from §316 which imposes unlimited clean-up costs on blameless parties and without considering their ability to pay or culpability. (See Footnote 11 above)

The Statute Imposes Strict Liability
Upon a Landowner or Occupier for the
Illegal Act of a Third Person Without any Requirement on the
State to Proceed Against That Person

It is contrary to all notions of fair play that the State was free under §316 to ignore Jacoby as the party responsible for creating the polluting condition. The Statute does not require the State to proceed against the party responsible for creating a polluting condition before it seeks to impose liability on land owners or occupiers effected by the pollution. In this very case it successfully resisted Jacoby's joinder based on the statutory scheme of prosecutorial responsibility set forth in the Pennsylvania Clean Streams Law. (*In re National Wood Preservers*, 64 D&C2d 78 (1974); A-91)

It was stipulated at the beginning of the hearings in this case that the *sole* basis for proceeding against Appel-

lant Wood was the language of §316. No effort was made to proceed against it as an actual polluter under various provisions of the Clean Streams Law which deal with action against polluters.

What Appellant Wood is confronted with, is a Statute denominated as civil by the Courts, supposedly imposing affirmative duties upon innocent landowners and occupiers, regardless of fault, the enforcement of which has all of the trappings of a criminal proceeding.[14] The government has been upheld in its statutory right under §316 to pick and choose Defendants without the usual right, generally present under modern rules of civil procedure, of permitting joinder of all parties who are required for a complete resolution of the matter. If the matter is criminal, then the Statute must fall because it punishes status without any act or mens rea requirement. *Robinson vs. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed2d 758 (1962).

The Strict Vicarious Liability
is Being Imposed Retroactively

It is not unreasonable to impose vicarious liability upon a party for acts of persons under the dominion and control of the party held responsible. It also may not be unreasonable to impose liability retroactively for prior acts of the very party held liable, or persons subject to their control. *Barnes & Tucker Co. vs. Pennsylvania*, 472 Pa. 115, 371 A.2d 461 (1977)

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14. Section 602 of the Act (35 P.S. §691.602) provides for stern fines and jail sentences on a progressively more severe basis. The full text of the Act is reproduced in the Appendix at A-113. This section of the law provides that every day of continued violation of any Order of the Department shall be a separate offense. It is not hard to imagine how fines and jail sentences could cumulate to an onerous penalty. In summary, therefore, §316 permits retroactive application of the penalty provision of §602 to punish a party solely on the basis of that party's status and for the acts of a third person committed years before the Statute came into existence and for a status which was also acquired years before the Statute was enacted.

However, it is beyond the pale of reason to impose retroactive liability for the acts of third persons, upon a party who neither controls such third persons nor had knowledge of the true nature of their acts, based upon a Statute passed by a legislature fourteen (14) years after the occurrence of such acts. *United States vs. Johns-Manville Corporation*, 245 F.Supp. 74 (E.D. Penna. 1965); *Usery vs. Turner Elkhorn Mining Co.*, 428 U.S. 1, 49 L.Ed.2d 752, 96 S.Ct. 2882 (1976). This is precisely what §316 permits and what occurred in this case.

Recent cases have allowed considerable latitude in permitting retroactive application of regulatory legislation, but only *where the cost of the remedy for a problem is allocated to the person charged with the liability under the Statute as an "actual, measurable cost of his business"*. *Usery vs. Turner Elkhorn Mining Co.*, supra. A more recent decision of this Court would indicate that retroactivity of legislation is not a factor which can be simply ignored. *Allied Structural Steel vs. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978).

Retroactive liability for the acts of third persons under §316 does not require that the polluting condition arise in the course of the landowner or occupier's business and in this respect, does not come under the holding of *Usery vs. Turner Elkhorn Mining co., supra.*

Similarly, this case is not one in which retroactive legislation should be justified based upon an "emergency". *Lichter vs. United States*, 334 U.S. 742, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948).

This Statute requires a person who went into possession of property seven (7) years before it was enacted to clean up a condition created by the illegal activities of a third party it did not control and carried out by that party fourteen (14) years before the Statute was enacted. It passes the bounds of reasonableness under the due process provisions of the 14th Amendment.

The Statute Impairs the Contractual Expectations of Tenants and *Past Purchasers of Property*

One of the serious oppressive features of §316 is that it tends to introduce new dangers and pitfalls into common transactions such as buying or leasing property. The normal expectation of a purchaser or lessee of surface rights to property is that he will get good title or the right to use property for legal purposes.

What can be expected from this statute are variations of what happened to Wood in this case. The State, wishing to have instant gratification, will attack the easiest party to find, be it record owner or the person who is present on the land, and use quasi-criminal sanctions to compel a recovery for the purpose of abating polluting conditions.

Instead of proper and cooperative efforts with governmental agencies to find and correct polluting conditions, owners or occupiers who discover such conditions, not created by themselves, will be encouraged to conceal the conditions and pass them off to unsuspecting buyers.

The liability imposed by the Statute is imposed equally upon owners and occupiers. The definitions section of the Statute does not define "occupier". Since no warning is provided to would-be renters of surface rights to property that they will be required to correct polluting conditions existing under the land, created by a third party, any enforcement of strict liability against such a person impairs that person's rental contract with his landlord. Even if upheld as against the owner of property, absent any requirement of culpability or negligence, the Statute unfairly reallocates, even if temporarily, the responsibility for pollution which was created prior to the Leasee's occupancy. *Allied Structural Steel Co. vs. Spannous*, supra.

No effort is made to classify occupiers on the basis of the duration of their leasehold interest. A tenant with

a six (6) month Lease is subject to the same responsibility as a landowner who has owned the property for twenty (20) years.

The Statute Gives Unlimited Discretion
to the Law Enforcement Agency with Respect
to What May be Required by Way of Compliance is Subject to Abuse

The orders in this case are open ended in that compliance is conditioned upon DER's "acceptance" of plans and specifications of work to be done by Appellant, without any indication as to what standard, if any, will govern the acceptance. Order of Environmental Hearing Board, July 30, 1976. (A-87)

"It is no answer to say that the power would not be arbitrarily or unreasonably exercised. It must be judged by what can be done under it, not by what may be done under it." In *Curtin vs. Benson*, 222 U.S. 78, 32 S.Ct. 31, 56 L.Ed.102 (1911).

Orders in the form upheld by the Court, place Appellants at the mercy of DER and in a position of corporate involuntary servitude. At this writing, almost seven (7) years, to the day, after the issuance of the original DER Orders, and after an expenditure of approximately One Hundred and Eighty Thousand ($180,000.00) Dollars on the pollution problem by the Federal government, there exists no concrete answer as to how much expense and effort by Appellant will be required in complying with the DER orders as modified by the Environmental Hearing Board.[15] It would appear that the DER is free to determine whatever it wishes with regard to the level of compliance expected, without limit.

In addition, DER is in a position to force Appellants to experiment on methods to solve the problem. The experimental activity, if determined by Board fiat to be "feasible", will mean that Wood will be expending funds to devise new methods of dealing with the problem

15. See Appendix at A-121-136.

which more properly should be borne by the government.

The Selective Enforcement Techniques Being Used in the Enforcement of this Statute, as Illustrated in This Case are Onerous and Oppressive and May Well Rise to a *Level of Denial of Equal Protection Under the Law*

In its Adjudication, the Board found that the polluting condition not only exists under the property owned or occupied by other parties to the litigation, Gum and Shell, but that it also existed under the property owned and occupied by several other parties, including the Commonwealth, Haverford township and other persons, the identification of whom were not disclosed in that proceeding. The Board also found that the participation of such landowners or occupiers was necessary to complete the removal program. Finally, the Board held that as applied to Appellant and other parties then before it, Section 316 could require them to correct a polluting condition "only on the land, which is owned or occupied by such person or entity and that it would be "unconstitutional to require the Appellant to take action outside his or its land".

The Commonwealth Court and the Pennsylvania Supreme Court have, by silence, affirmed these findings. They have also removed Shell and Gum from these proceedings. In essence, Wood, together with Rogers, will be required to attempt to remove a polluting condition under their property, which cannot be removed without the cooperation of other landowners or occupiers, who by the lower Court's decision, cannot be proceeded against to give such cooperation. Under these circumstances, requiring it to expend the funds necessary to attempt to remove the pollutant, would be a vain and wasteful act.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction in this matter to review and reverse the Order of the Supreme Court of Pennsylvania.

FELL, SPALDING, GOFF & RUBIN

BY:_____

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